

# Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## DEPARTMENT OF AGRICULTURE

### Food and Consumer Service

#### 7 CFR Parts 273 and 275

[Amdt. No. 366]

RIN 0584-AB75

#### **Food Stamp Program: Quality Control Provisions of the Mickey Leland Childhood Hunger Relief Act**

**AGENCY:** Food and Consumer Service, USDA.

**ACTION:** Proposed rule.

**SUMMARY:** This action proposes changes to Food Stamp Program regulations based on section 13951 of the Mickey Leland Childhood Hunger Relief Act. This action proposes to modify the quality control system of the Food Stamp Program in the following areas: timeframes for completion of all review activity, exclusion of variances resulting from the application of new regulations, the tolerance level for excessive error rates, the calculation of liability amounts, interest charges on liability amounts, good cause relief from liabilities, and the authority of the Administrative Law Judges to determine good cause. This action proposes to incorporate these legislative provisions into the Food Stamp Program regulations.

**DATES:** Comments must be received by August 22, 1995 to be assured of consideration.

**ADDRESSES:** Send comments to Quality Control Policy Section, Quality Control Branch, Food Stamp Program, Food and Consumer Service, USDA, 3101 Park Center Drive, Room 904, Alexandria, Virginia 22302.

**FOR FURTHER INFORMATION CONTACT:** John H. Knaus, Chief, Quality Control Branch, Program Accountability Division, Food and Consumer Service, USDA, 3101 Park Center Drive, Room

904, Alexandria, Virginia 22302, (703) 305-2472.

#### **SUPPLEMENTARY INFORMATION:**

##### **Classification**

##### *Executive Order 12866*

This rule has been determined to be significant and was reviewed by the Office of Management and Budget under Executive Order 12866.

##### *Executive Order 12372*

The Food Stamp Program is listed in the Catalog of Federal Domestic Assistance under No. 10.551. For the reasons set forth in the final rule at 7 CFR 3015, Subpart V and related Notice (48 FR 29115, June 24, 1983), this Program is excluded from the scope of Executive Order 12372 which requires intergovernmental consultation with State and local officials.

##### *Executive Order 12778*

This action has been reviewed under Executive Order 12778, Civil Justice Reform. This rule is intended to have preemptive effect with respect to any state or local laws, regulations or policies which conflict with its provisions or which would otherwise impede its full implementation. This rule is not intended to have retroactive effect unless so specified in the "Implementation" section of this preamble. Prior to any judicial challenge to the provisions of this rule or the application of its provisions, all applicable administrative procedures must be exhausted. In the Food Stamp Program the administrative procedures are as follows: (1) For program benefit recipients—State administrative procedures issued pursuant to 7 U.S.C. 2020(e)(10) and 7 CFR 273.15; (2) for State agencies—administrative procedures issued pursuant to 7 U.S.C. 2023 set out at 7 CFR 276.7 (for rules related to non-QC liabilities) or Part 283 (for rules related to QC liabilities); (3) for program retailers and wholesalers—administrative procedures issued pursuant to 7 U.S.C. 2023 set out at 7 CFR 278.8.

##### *Regulatory Flexibility Act*

This action has been reviewed with regard to the requirements of the

Regulatory Flexibility Act of 1980 (5 U.S.C. 601 through 612). William E. Ludwig, Administrator of the Food and Consumer Service, has certified that this rule does not have a significant economic impact on a substantial number of small entities. The requirements will affect State and local agencies that administer the Food Stamp Program.

##### *Paperwork Reduction Act*

This proposed rule contains information collections which are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1980 (44 U.S.C. 3507). The title, description, and respondent description of the information collections are shown below with an estimate of the annual reporting and recordkeeping burdens. The estimate covers the time that a State agency will need to complete and transmit a checklist with each request for arbitration. As FCS will provide the content of the checklist to the State agency it is believed that any time spent on the design of the checklist will be minimal. The increase in burden hours reflects current requirements for the arbitration process which were not previously submitted for approval.

*Title:* Arbitration Checklist.

*Description:* Final regulations published January 21, 1988 (53 FR 1603) required State agencies to provide full documentation of the case and the policy(s) in question when requesting arbitration. The burden on the States for providing the documentation necessary for arbitration under the requirements of that final rule were not submitted for approval and inclusion under OMB No. 0584-0303 which covers existing reporting and recordkeeping requirements of 7 CFR part 275. The existing requirements in OMB No. 0584-0303 have been approved for use through July 31, 1994. Thus, the following does not represent a change in actual burden, but rather it reflects a redefinition of what is to be included as burden under 7 CFR part 275.

*Description of Respondents:* State agencies.

*Estimated Annual Reporting and Recordkeeping Burden:*

Section	Annual number of respondents	Annual frequency	Average burden per response hours	Annual burden hours
7 CFR 275:				
Existing .....	53	1	5.0236	266
Proposed .....	53	10	10.4	5512
Total Existing Burden Hours: 266				
Total Proposed Burden Hours: 5512				
Total Difference: 5246.				

Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to the Department of Agriculture, Clearance Officer, OIRM, Room 404-W, Washington, DC 20250; and to the Office of Management and Budget, Paperwork Reduction Project (OMB # 0584-A679), Washington, DC 20503, ATTN: Wendy Taylor.

### Background

Section 13951 of the Mickey Leland Childhood Hunger Relief Act, (the "Leland Act"), Chapter 3, Title XIII of the Omnibus Budget Reconciliation Act of 1993 (Pub. L. 103-66), revises sections 13(a)(1), 14(a), and 16(c) of the Food Stamp Act of 1977, as amended, (the "Act").

Section 13 of the Food Stamp Act is entitled "Collection and Disposition of Claims". Subsection (a)(1) of this section concerns the settlement and adjustment of claims, including the waiver, for good cause, of all or a portion of a quality control (QC) liability claim established against a State agency. This subsection also addresses the collection of interest on such liability claims. The Leland Act has amended the Food Stamp Act to remove the authority of the Secretary of Agriculture's designee, the Food and Consumer Service ("FCS"), to render good cause determinations. In addition, the timeframes for charging interest on any unpaid portion of a liability claim has been changed from two years to one year after the date that a bill for collection of a liability claim has been received by a State agency.

Section 14 of the Act is entitled "Administrative and Judicial Review". Subsection (a) of this section concerns the authority of Department of Agriculture Administrative Law Judges (ALJs) to review liability claims. The Leland Act has amended the Act to grant the ALJs the authority to determine, upon the request of a State agency, whether or not good cause exists to waive all or a portion of a liability claim.

Section 16 of the Food Stamp Act is entitled "Administrative Cost-Sharing and Quality Control". Subsection (c) of this section concerns payment accuracy and provides for liabilities against State agencies with payment error rates that exceed established tolerance levels, and provides for enhanced funding for State agencies with the lowest error rates. The Leland Act includes a number of provisions which replace key features of the existing liability/incentive system. The Leland Act establishes the national average error rate (also referred to as the national performance measure) for a given fiscal year as the tolerance level for individual State agency error rates for that year. Previously, the tolerance level was equivalent to the lowest national average error rate ever achieved, plus one percentage point. The Leland Act also modifies the calculation of sanction amounts. Prior to the Leland Act, a State agency with an individual error rate which exceeded the tolerance level had a liability equivalent to the difference between the State agency's error rate and the tolerance level, times the total value of food stamp issuance by the State agency for that fiscal year. The Leland Act modifies this calculation by the addition of another factor, the percentage by which a State agency's error rate exceeds the tolerance level or 1 (one), whichever is smaller. In addition, the Leland Act has modified the variance exclusion period for implementation of new regulations from 60/90 days to 120 days. The Leland Act has also changed the timeframes for the determination of final State agency error rates, the national average payment error rate, and the amounts of liability claims against State agencies. The Leland Act provides that these figures must be determined, and State agencies notified, no later than 30 days after the completion of the case review and arbitration process. The case review and arbitration process itself will now be required to be completed no later than 180 days after the end of the fiscal year. Finally, the Leland Act adds specific criteria into the language of section 16(c) of the Food

Stamp Act for what will be considered "good cause" for the waiver of liability claims.

As part of the implementation of the new payment accuracy system, this proposed rule addresses amendments made by section 13951 of the Leland Act. Other provisions of section 13951 concerned with the timeframes involved in the administrative law judge appeal process have been published in a separate rulemaking.

### Time Limits

Section 13951 of the Leland Act amends the Act by specifying that "not later than 180 days after the end of the fiscal year, the case review and all arbitrations of State-Federal difference cases shall be completed". This means that by March 29th (March 28th in leap years) each year, all State agency QC reviews must be disposed of and transmitted into the Integrated Quality Control System, all Federally subsampled QC reviews must be selected and completed by FCS, and any disparity between the State agency and Federal review findings must be resolved. It should be recognized that these activities can, and do, take place concurrently over the course of the annual review period, but that they cannot be completed simultaneously. The final Federal subsample cannot be selected until all State agency reviews have been disposed of, and final arbitration requests and determinations cannot be made until all Federal reviews have been completed, and the findings transmitted to the State agencies. Current regulations at 7 CFR 275.21 provide State agencies with a deadline of January 5th to dispose of all QC reviews, and regulations at 7 CFR 275.23(e)(8) specify that FCS must determine final payment error rates, and notify State agencies of these error rates by June 30th. Current regulations do not specify any deadline for the completion of the arbitration process. The Department has determined that the deadlines mandated by section 13951 of the Leland Act cannot be met without changes in the timeframes for the completion of QC reviews, and changes

in the arbitration system. The specific Departmental proposals for meeting the deadlines mandated by the Leland Act are contained in paragraphs entitled *Validation of State Agency Error Rates—§ 275.3(c)*, *Arbitration—§ 275.3(c)(4)*, and *Quality control review reports—§ 275.21*.

#### **Validation of State Agency Error Rates—§ 275.3(c)**

Current regulations at 7 CFR 275.3(c)(1)(iii), published February 17, 1984 (49 FR 6292), specify that FCS Regional Offices shall assist State agencies in completing case reviews that State agencies were unable to complete due to refusal on the part of a household to cooperate with the State agency QC reviewer. It was determined that FCS Regional Offices should assist State agencies in completing these difficult cases because of the importance that accepted statistical practices place on completion of the maximum possible percentage of sampled cases. Regulations require a State agency to complete 100 per cent of the cases sampled for QC review. Failure to complete 100 per cent of the sampled cases results in FCS adjusting a State agency's regressed error rate (see regulations at 7 CFR 275.23(e)(7)(iii)). Actual experience since the implementation of these regulations has shown that FCS Regional Offices are rarely able to gain the cooperation of a household which has refused to cooperate with the State agency, so that the results of this effort fail to justify the staff time and resources dedicated to it. These efforts have also had a negative impact on the efficiency of the State agency review process in some instances. Occasionally a household will misinform the FCS Regional Office that it is willing to cooperate with a State agency QC reviewer. When the State agency reviewer attempts to contact the household and complete the review the household again refuses to cooperate. The case must remain incomplete, and additional State agency staff time and resources have been expended in the process.

Section 13951 of the Leland Act amends the Food Stamp Act by specifying that "not later than 180 days after the end of the fiscal year, the case review and all arbitrations of State-Federal difference cases shall be completed." The Department has concluded that this mandated deadline cannot be achieved without maximizing the efficiency of the QC process at both the State agency and Federal review levels. Because efforts on the part of FCS Regional Offices to assist State agencies in completing refusal-to-

cooperate cases have proven to be ineffective the Department is proposing to amend regulations so that an FCS Regional Office will only assist a State agency in attempting to complete refusal-to-cooperate cases at the specific request of the State agency. This will allow the State agency, which is in the best position to evaluate the probability of success, to determine whether or not additional efforts should be made to complete reviews in which the household has refused to cooperate.

#### **Arbitration—§ 275.3(c)(4)**

Current regulations at 7 CFR 275.3(c)(4), published January 21, 1988 (53 FR 1603), and June 5, 1989 (54 FR 23950) contain the QC procedures for arbitrating differences in review findings between State agencies and FCS. Under current procedures a State agency which disagrees with the FCS review findings for an individual case has a maximum of 28 calendar days after receipt of the Federal findings to request reevaluation of the Federal findings by a Regional arbitrator. The Regional arbitrator has 30 days from the date of such a request to determine the correctness of the Federal findings or to notify the State agency of the status of the arbitration case. A State agency which disagrees with a Regional arbitrator's review findings for an individual case has a maximum of 28 calendar days after receipt of the Regional arbitrator's decision to request a reevaluation of the Regional arbitrator's decision by a National arbitrator. The National arbitrator has no established time limit for rendering decisions on the correctness of the Regional arbitrator's findings. As these timeframes would indicate, arbitration is a process which can routinely take as many as 86 days to reach the level of national arbitration. This estimate does not include possible delays when a Regional arbitrator requests additional information from a State agency. Nor does this figure contain any time estimate for the completion of the National arbitrator's evaluation, which can vary greatly depending on priorities, the workload of the National arbitrator, and the complexity of the case under review. Section 13951 of the Leland Act amends the Food Stamp Act by specifying that "not later than 180 days after the end of the fiscal year [March 29th, or March 28th in leap years], the case review and all arbitrations of State-Federal difference cases shall be completed." Granting that the current arbitration process (not including the National arbitrator's evaluation) can routinely take 86 calendar days, it would be necessary for the arbitration

process to begin earlier than January 2nd following the end of the fiscal year in order to insure meeting the March 29th deadline. Current regulations at 7 CFR 275.21(b)(2) provide State agencies with 95 days from the end of a sample month to complete all case reviews. This means that for the last sample month of the review period (September) the State agencies final deadline for disposing of all cases for the fiscal year is January 5th. The Department has concluded that the deadlines mandated by the Leland Act for the completion of arbitration for a fiscal year cannot be achieved without a restructuring of the current arbitration system.

The Department proposes to replace the current two-tier arbitration process with a one-tier arbitration system. State agencies would submit requests for arbitration to their appropriate FCS Regional offices within 10 days of receipt of the Federal QC findings for a case. The Department considers 10 days to be sufficient for a State agency to submit requests for arbitration because the State agency has already completed its review of households' circumstances before the Federal review was conducted. In preparing its cases for arbitration the State agency is simply identifying the specific case issue(s) in dispute between the State agency and FCS, and then ensuring that all verification, documentation, or other material supporting its findings are included in its submittal(s). The FCS Regional office QC staff may also submit to the arbitrator(s) a response to the State agency's request either agreeing with the State agency or explaining why the State agency's position is incorrect. The arbitrator(s) would be allowed a maximum of 35 calendar days from the date a request is received to render a decision regarding the accuracy of the Federal QC findings and disposition in a case. Prudence dictates that with the modification of the arbitration system to a single level of review, the reviewing official should be allowed the longest possible timeframe to render decisions.

The Department is proposing a number of other changes to the arbitration process to maximize the efficiency and accuracy of the system. The proposed regulations would limit requests for arbitration to those cases where the State agency's findings or disposition, as transmitted to the National Computer Center's (NCC) Integrated Quality Control System (IQCS), differ from the Federal findings or disposition transmitted to NCC. These cases are commonly referred to as "disagree cases". Under the proposed system State agencies will not be permitted to arbitrate cases where the

State agency's and Federal findings or disposition are the same. The purpose of the arbitration system is solely to resolve disagreements between the State agency's and Federal findings or disposition. State agencies have sometimes used the arbitration process as a way of registering disagreement with FCS policy on an issue. In these cases, the State agency agrees that the findings were correct, but it does not approve of the current Federal policy. The Department maintains that it is important to dedicate the limited resources and staff to those cases where there is a difference between the State agency's and FCS regional office's findings or disposition of an individual case, rather than those cases where all parties agree.

As a further expedient to maximizing the efficiency of the arbitration system, the Department is proposing that State agencies be required to submit specific documents and to ensure that their arbitration requests are complete, legible, and understandable. Over the past several fiscal years, requests for arbitration have frequently failed to provide arbitrators with the information needed to render decisions efficiently and accurately without time consuming requests for additional information or clarification. Common problems have included: illegible documents, blank photocopied pages, income calculations that cannot be duplicated, missing information regarding waivers in effect at the time of the review, and lack of documentation regarding the reporting and budgeting systems applicable to the case. When arbitrators confront these problems, they often must recontact State agencies and Regional offices for clarification. This process has become both time-consuming and confusing. As a solution to this problem, the Department proposes to require a standardized set of documents to accompany each State agency request. The Department proposes that the following items be required: (1) The request for arbitration and basic case information, which would include State, sample month and year, review number, review date, reporting and budgeting procedure, food stamp procedures for budgeting grants from the Aid to Families with Dependent Children Program, certification period, and calendar or fiscal month system; (2) Information about the certification action under dispute, which would include initial certification or recertification, legible certification work papers, legible State agency quality control work papers, and legible regional office quality control work

papers; and (3) Information about the State agency's specific issues, which would include the element under dispute, regulatory citations, handbook citations, policy memoranda, legislative implementation dates, applicable waivers, and verification of facts. Each arbitration request would also include a checklist identifying the required items and indicating whether they were included with the request. The Department is particularly interested in soliciting comments about the need for such a checklist, the items that should appear on the checklist, and any alternatives that might be suggested to enhance the efficiency of arbitration.

If a State agency submitted an incomplete request for arbitration the arbitrator would render a decision based strictly on the merits of the available information. This does not mean that in instances where the State agency submits an incomplete request, and the FCS Regional office submits a response, the arbitrator(s) would automatically decide in favor of the Federal position because of the incomplete State agency request. Nor would this apply in the reverse situation. If a State agency's request for arbitration is complete but the FCS Regional office does not submit a response, the arbitrator(s) would not automatically decide in favor of the State agency's position because the Regional office had not submitted a response. The arbitrator(s) would make an independent judgement of the request, based upon whatever information the State agency and Regional office had provided. The proposed procedure would not permit a State agency to submit a partial request for arbitration and then supply supporting documentation over a ten day period.

In order to ensure that the QC process meets the legislated timeframes the Department is proposing that arbitration be limited to those cases where the State agency's findings and disposition were transmitted to the National Computer Center's (NCC) Integrated Quality Control System (IQCS) in a timely manner. The timeframes for the transmission of case findings to NCC is discussed in the paragraph entitled "*Quality control review reports—§ 275.21*". The Department maintains that State agency reviews which are not completed and transmitted into the IQCS in a timely manner delay the selection and completion of FCS's Federal QC subsample reviews, and jeopardize the system's ability to meet the deadlines mandated by the Leland Act for the completion of all case review and arbitration activity. The Department proposes to restrict arbitration to those

case reviews which have met the timeframes for transmittal to NCC to ensure that the QC process is completed in time to meet the mandated deadline of 180 calendar days after the end of the fiscal year. This restriction would not apply to one exceptional class of case reviews transmitted into the IQCS in an untimely manner. This class would be cases originally disposed of (in a timely manner) as incomplete due to refusal to cooperate on the part of the food stamp household. If the household later agrees to cooperate with QC and the review is completed and retransmitted to IQCS on a date after the original deadline for completing the case, but prior to the final deadline for disposing of all cases for the review period (December 29th under these proposed rules) the State agency would retain the right to request arbitration of the review findings of the completed case (assuming that the completed case is selected for FCS review, and the Federal review findings/disposition disagree with the State agency's findings/disposition). The Department is soliciting comments on additional categories of case reviews which should be excluded from the timeframe restrictions for arbitration.

#### **Quality Control Review Reports— § 275.21**

Current regulations at 7 CFR 275.21(b), published February 17, 1984 (49 FR 6292), specify the timeframes for State agencies to dispose of and report the findings of cases selected for QC review. Under current procedures a State agency has 75 calendar days from the end of a sample month to dispose of 90 percent of the cases selected for review in that month; 100 percent of the cases must be disposed of within 95 days of the end of the sample month. As discussed in the section dealing with the arbitration process, this means that for the last sample month of the review period (September) the State agencies final deadline for disposing of all cases for the fiscal year is currently January 5th. The Department is proposing an arbitration system which will provide State agencies the opportunity to submit a request for arbitration of a case, to be received by the appropriate FCS regional office within 10 days from the date of receipt of the Federal findings, and 35 days for the arbitrator(s) to render a decision on a case. Thus, arbitration will be a process which could routinely take up to 45 days to complete. This is the minimum timeframe which the Department has deemed necessary to ensure an arbitration process which will render accurate determinations. Section 13951 of the Leland Act amends the Food

Stamp Act of 1977 by specifying that "not later than 180 days after the end of the fiscal year [March 29th, or March 28th in leap years], the case review and all arbitrations of State-Federal difference cases shall be completed." Since the Department has concluded that the arbitration process requires a minimum of 45 calendar days to ensure accurate decisions being rendered, it would be necessary for the arbitration process to begin no later than February 12th following the end of the fiscal year in order to insure meeting the March 29th deadline. With the current State agency deadline for final case disposition of January 5th, this would leave FCS a total of 38 days to select the final Federal subsample of cases (approximately 1,580 cases, based on one month, or one twelfth, of the Fiscal Year 1991 Federal sample size of 18,982), accumulate the State agency and local office records necessary for the completion of the Federal reviews, complete the Federal review, and transmit the Federal review findings to the appropriate State agencies. The Department concludes that the deadlines mandated by the Leland Act for case completion (both State agency and Federal reviews) and arbitration cannot be achieved without restructuring the current timeframes for case completion.

The Department proposes to modify the deadline for State agencies to dispose of QC cases and transmit review findings to NCC's IQCS, by requiring that 100 percent of the cases selected for review be disposed of within 90 calendar days of the end of the sample month for which the cases were selected for review. State agencies would continue to be required to dispose of 90 percent of selected cases within 75 calendar days of the end of the sample month for which the cases were selected for review, as provided for in current regulations at 7 CFR 275.21(b)(2). Such a timeframe will result in a final annual deadline for the completion of State agency reviews of December 29th. This will provide FCS with approximately 45 days to complete the Federal case review process and transmit final Federal review findings to the State agencies. While the Department recognizes that the proposed timeframes for case completion may require dedication of additional resources by both State agencies and FCS, only a modification of the case completion timeframes and adherence to them, in conjunction with the redesign of the arbitration process, will allow sufficient time to meet the mandated deadlines contained in the Leland Act. Because of

the importance which accepted statistical practices places on the completion of the maximum possible number of cases sampled for QC review, the Department is proposing to restate, in this section of the regulations, instructions currently contained in 7 CFR 275.12(g).

#### *Disposition of Case Reviews*

These instructions specify that without FCS approval a State agency shall not dispose of a case as not completed based solely on the fact that the State agency was unable to complete the case in time to meet the timeframes for the disposal of case reviews.

The Department is also proposing a conforming change to regulations at 7 CFR 273.2(d)(2), *Cooperation with QC Reviewer*. This section of the regulations, published February 17, 1984 (49 FR 6292), currently specifies that food stamp households which refuse to cooperate with a quality control reviewer shall be determined ineligible to participate in the Food Stamp Program until 95 days after the end of the annual QC review period, or until the household cooperates with the QC reviewer (whichever is earlier). This 95 day timeframe was established to correspond to the 95 day timeframe which the State agency has to dispose of QC reviews. Just as QC has a final deadline for the disposal of all reviews for an annual review period of 95 days after the end of the review period, a household which refuses to cooperate with QC is determined ineligible to participate in the Program until 95 days after the end of the annual review period. The Department is proposing to change the period of household ineligibility from 95 to 90 days after the end of the annual review period, in order to correspond to the proposed change to the State agencies timeframes for the disposition of QC reviews. The Department is proposing an additional conforming change to regulations at 7 CFR 273.2(f)(1)(ix). This section of the regulations, published February 4, 1987 (52 FR 3402), deals with the requirement that State agencies verify all factors of eligibility for households which have been terminated for refusal to cooperate with quality control. A reference is made in this section to the period of ineligibility lasting until the 95 day after the end of the annual review period. The Department is proposing to change the reference from 95 to 90 days after the end of the annual review period, in order to correspond to the proposed change to the State agencies timeframes for the disposition of QC reviews.

#### **Variances Excluded From Error Analysis—§ 275.12(d)(2)**

Prior to the Leland Act, section 16(c)(3) of the Food Stamp Act specified that any errors resulting from the application of new regulations promulgated under the Act during the first 60 days (or 90 days at the discretion of the Secretary) from the required implementation date of such regulations shall be excluded from the payment error rate. Section 13951 of the Leland Act amends the Act by changing the timeframe for excluding these errors from 60 (or 90) days, to 120 days. In response to this change the Department is proposing a regulatory change at 7 CFR 275.12(d)(2)(vii) to reflect the new timeframe for excluding variances resulting from the promulgation of new regulations.

#### **State Agencies' Liabilities for Payment Error—Fiscal Year 1986 and Beyond—§ 275.23(e)(4)**

Current regulations at 7 CFR 275.23(e)(4), published November 27, 1991 (56 FR 60045), specify a payment error rate tolerance level for any fiscal year to be one percentage point added to the lowest national performance measure announced up to and including that fiscal year. A State agency which exceeds this tolerance level is subject to a liability claim equivalent to the difference between the State agency's payment error rate and the tolerance level, multiplied by the total value of the allotments issued in the fiscal year by the State agency. Section 13951 of the Leland Act establishes a new system of payment error rate goals and consequences. The payment error rate tolerance level, beginning in Fiscal Year 1992 and applying to Fiscal Year 1992 and all subsequent fiscal years, is the national performance measure for the fiscal year. The national performance measure continues to be defined as the sum of the products of each State agency's payment error rate times that State agency's proportion of the total value of national allotments issued for the fiscal year using the most recent issuance data available at the time the State agency is notified of its payment error rate. A State agency which exceeds this tolerance level is now subject to a liability claim equivalent to the total value of the allotments issued in the fiscal year by the State agency, multiplied by a factor which is the lesser of (1) the ratio of the amount by which the payment error rate of the State agency for the fiscal year exceeds the national performance measure for the fiscal year, to the national performance measure for the fiscal year,

or (2) one. This figure is then multiplied by the amount by which the payment error rate of the State agency for the fiscal year exceeds the national performance measure for the fiscal year.

The Department is proposing changes to regulations at 7 CFR 275.23(e) to revise current subparagraph (4) to reflect the fact that the sanction system mandated by the Hunger Prevention Act of 1988 (Pub. L. 100-435, enacted September 19, 1988) (the "Hunger Prevention Act") now applies only to Fiscal Years 1986 through 1991. A new paragraph will be added to reflect the sanction system mandated by the Leland Act for Fiscal Year 1992, and all subsequent fiscal years. In addition, the Department proposes to continue the current policy under which, once announced, the national performance measure for a fiscal year will not be subject to change. The Leland Act mandates that within 30 days of the completion of the case review and arbitration process for a fiscal year (which itself must be completed within 180 days of the end of the fiscal year) the Department shall determine *final* error rates, the national performance measure, and the amounts of liability claims against State agencies [emphasis added]. The Department concludes that the intent of the Leland Act is that once individual State agency error rates, and the national performance measure are announced, they are final, and that adjustments to these figures cannot be considered.

#### **Good Cause—§ 275.23(e)(6)**

The Food Stamp Act of 1977, as amended by the Hunger Prevention Act, allows relief from all or a part of a Quality Control liability as established under § 275.23(e)(4) when a State agency can demonstrate that a part or all of an excessive error rate was due to an unusual event which had an uncontrollable impact on the State agency's payment error rate. The legislative history for current regulations governing good cause provides that "The purpose of good cause under the new system is to allow the Secretary the discretion to provide relief when a State with otherwise effective administration has faced an unusual event with a large uncontrollable impact on errors." (House Report 100-828, part 1, page 34).

Although the Leland Act transfers the authority to grant good cause relief from the Secretary of Agriculture to the Department's Administrative Law Judges (ALJs), the intent as to what constitutes good cause has not changed. Congress' intent was made clear in the legislative history accompanying the

Leland Act which states, "It is the Committee's intent that the new national performance measure will provide relief for those factors that are not unique to any one state agency, such as the effects of recession or program changes. However, the Committee recognizes that there will be unusual events with an uncontrollable impact on errors which affect *state agencies with otherwise effective program administration* (emphasis added). The Committee expects that these *individual state situations* (emphasis added) will be addressed through the good cause waiver procedures. The Committee also expects that the Secretary's determination on states' good cause waiver requests will be based on good cause criteria, and not on such factors as budget considerations." (House Report 103-111, pg.12). Other than the provision that the determination to waive all or part of a Quality Control liability will be made by an ALJ, this intent was adopted by the Conference Substitute. (Statement of Managers). The language of these reports reaffirms Departmental policy as established under the provisions of the Hunger Prevention Act.

The Department concludes, therefore, that good cause relief is intended to ensure that a State agency which otherwise effectively administers the Food Stamp Program is not held liable for that portion of an excessive error rate caused by an unusual event which has an uncontrollable impact on a State agency's payment error rate.

The Leland Act provides good cause consideration for the following unusual events: (A) a natural disaster or civil disorder that adversely affects Food Stamp Program operations; (B) a strike by employees of a State agency who are necessary for the determination of eligibility and processing of case changes under the Food Stamp Program; (C) a significant growth in food stamp caseload in a State prior to or during a fiscal year, such as a 15 percent growth in caseload; (D) a change in the Food Stamp Program or other Federal or State program that has a substantial adverse impact on the management of the Food Stamp Program of a State; and (E) a significant circumstance beyond the control of the State agency.

This proposed rulemaking adopts the unusual events which qualify for consideration under good cause relief. As noted above, the legislative history makes clear that good cause relief based on the impact of unusual events is limited to *individual state situations*, and that allowances for those situations that are not unique to any one state are

made via the national performance measure.

The effects of recession and program changes are specifically identified in the legislative history as factors that are not considered unique to any one state. Program changes have therefore been designated both as an unusual situation for which good cause relief will be considered and as a condition that is not unique to one state. From this report language, the Department concludes Congress' intent was that the five situations are considered "unusual events", appropriate for good cause relief, only if they exceed a national norm.

The preamble to current regulations published September 28, 1992, (57 FR 44482) discusses further those situations that will not be considered for good cause relief.

Current regulations at § 275.23(e)(6)(i) describe the criteria and methodology under which FCS will grant good cause waivers. While the Secretary or the Secretary's designee will no longer be making the final determination in good cause appeals, FCS retains the authority to establish criteria under which good cause is evaluated. The Department wishes to make it clear that current criteria and methodology, with modifications, will serve as guidelines for both FCS and the ALJ to assess, evaluate and respond to claims by the State agency for a good cause waiver of liability in conjunction with the appeals process. As under current regulations, an alternate methodology will continue to be used for certain events when a State agency provides insufficient information to demonstrate using factual analysis that the unusual event had an uncontrollable impact on the error rate. However, the Department is proposing modifications to these alternate methodologies. While current procedures take into account the duration of an unusual event, they do not measure the degree of impact that the unusual event has on Program operations. As a result, a Federally-declared disaster, for example, is treated the same regardless of size of the counties affected or amount of issuances for those counties. The Department is proposing an alternate methodology that will take into account both the duration of the unusual event and the magnitude or intensity of the unusual event. The alternate methodologies have also been modified to include specific procedures for calculating waiver amounts to ensure equity and consistency in these determinations. The following is a summary of the modifications to the alternate methodologies:

### Disasters/Civil Disorders and Strikes

Duration will be measured by the number of months the event had an adverse impact on program operations. Intensity of these unusual events will be a proportional measurement of the issuances for the counties affected to the State's total issuance. The amount of the waiver of liability will be determined using the following linear equation:  $Ia/Ib \times [M/12 \text{ or } Mp/18] \times L$  where; Ia is the issuance for the first full month immediately preceding the unusual event for the county affected; Ib is the State's total issuance for the first full month immediately preceding the unusual event; M/12 is number of months in the subject fiscal year that the unusual event had an adverse impact on program operations; Mp/18 is the number of months in the last half (April through September) of the prior fiscal year that the unusual event had an adverse impact on program operations; L is the total amount of the liability for the fiscal year.

For example, a tornado hits County A on 5/15, and the County is declared a Federal disaster area. Program operations in this county were adversely impacted for 3 months. In addition, a significant number of program staff from County B were diverted for 1 month to handle the crises in County A. Issuance figures for the month of April were: 2,000,000 (A); 1,900,000 (B); 38,500,000 (Statewide). The liability for the fiscal yr. was \$3,300,000. The above formula is applied as follows: County A— $[2,000,000/38,500,000] \times 3/12 \times 3,300,000$  OR:  $.05195 \times .25 \times 3,300,000 = \$42,858$  credit to the liability. County B— $[1,900,000/38,500,000] \times 1/12 \times 3,300,000$  OR:  $.04935 \times .08333 \times 3,300,000 = \$13,571$  credit to the liability. Total credit to the liability is \$56,429 (\$42,858 + \$13,571). This results in a revised liability for the State agency of \$3,243,571 (\$3,300,000—\$56,429).

### Significant Growth in Food Stamp Caseload

Duration and intensity will be measured by the degree to which caseload growth, statewide, exceeds 15 percent during the 12 month period from April of the prior fiscal year through March of the subject fiscal year, and by the degree to which a State's error rate exceeds the national performance measure. The amount of waiver of liability will be determined using a ratio of the percentage of caseload increase from a 12 month base period to the percentage the State's error rate exceeds the national performance measure.

This proportional measurement is based on procedures similar to the "sliding scale" used for the determination of liability amounts, and incorporates a floating national average which accounts for those factors that are common to all States. Using the error rate in this calculation allows greater consideration for a State agency that effectively manages caseload growth. As a result, a State agency with an error rate barely exceeding the national performance measure and an 18 percent increase in caseload growth will receive a proportionally larger waiver amount than a State agency with the same percentage of caseload growth but with an error rate greatly exceeding the national performance measure.

Under this alternate methodology, requisite caseload growth will be determined statewide rather than by individual counties. The Department recognizes that an individual county, because of its size, may drive the error rate for the State as a whole. The State agency may still use the impact of caseload growth in individual counties on the State's error rate to pursue good cause relief under the primary criterion. With the improvements in automated systems for data analysis, State agencies should have little difficulty in demonstrating the impact on the error rate when the impact is significant. The Department has designed the alternate methodology for use when the impact of an unusual event on the error rate is more difficult to isolate and distinguish.

Caseload growth occurring in the last half of the subject fiscal year will not be considered under the alternate methodology. The Department believes caseload growth occurring in the six month period prior to the subject fiscal year and in the beginning of the subject fiscal year will have a greater potential for disrupting Program operations as more months will be affected than will caseload growth occurring at the end of the fiscal year. For example, an increase in caseload growth prior to the subject fiscal year will have an impact on the error rate for the entire 12 months while caseload growth in the last month of the fiscal year will have an impact for only 1 month. If the State agency can demonstrate the effects of caseload growth in the last half of the subject fiscal year, it may do so under primary criterion.

The Department is proposing to modify the alternate methodology by using an average of 12 months as the base period from which caseload growth is measured rather than the 1 month base period that is currently used. An average of 12 months takes into account normal fluctuations in growth occurring

over a period of time, and provides a more accurate indication of actual growth than does 1 month.

These methodologies are described in full in the regulatory section of this proposed rule.

In the application of the criteria and methodology, the mere existence of an unusual event specified under good cause relief is not, by itself, sufficient to establish a determination of good cause. Congressional intent is explicit in stating that a determination of good cause is contingent upon the following 3 conditions:

(1) An unusual event must occur. As previously stated, good cause relief is only appropriate for events affecting individual State agencies and exceeding a national norm. The national performance measure which floats from year to year provides relief for those factors that are common to all States. Certain events may be common to all States but have a significantly different impact on State agencies for a variety of reasons. For example, while all State agencies are required to implement new regulations, an individual State agency may be disproportionately affected by the program change due to the State's caseload demographics. New regulations affecting Native American households on reservations, for instance, would have an extensive impact on State agencies with a large population of such food stamp households. In these situations, the State agency needs to demonstrate the disproportionate effect caused by the unusual event. Good cause relief will be considered to the extent the unusual event has an uncontrollable impact on a State's error rate beyond the relief that is already provided through the national performance measure.

(2) The event must have an uncontrollable impact on errors. For example, during the middle of a review period, several counties within a state are declared Federal disaster areas due to massive flooding. This disaster occurs shortly after the expiration of the variance exclusion period for a new regulation which the State agency implemented timely but incorrectly. Subsequent to the disaster, there is a significant increase in the error rate. Data analysis show that the increase in the error rate was attributable to the State's incorrect implementation of the regulation. Even though there was a Federally declared disaster, a good cause determination is not appropriate, in this example, because the increase in the error rate resulted from a factor that was not associated with the unusual event. Good cause relief will be considered only for that portion of the



error rate/liability attributable to the unusual event.

(3) The event must affect a State agency with otherwise effective Program administration. Under current regulations, otherwise effective administration is measured and evaluated by the State's error rate together with any other available error rate data immediately before and after the unusual event, and by determining the impact of the unusual event on the error rate. With this proposed rulemaking, the Department is modifying this measurement to take into consideration the degree to which the error rate exceeds the national performance measure.

#### **FCS Timeframes—§ 275.23(e)(8)**

Prior to the Leland Act, section 16(c)(5) of the Food Stamp Act specified that the Secretary must make the determinations regarding any possible incentive payments or claims, and notify the State agencies of these determinations, within nine months following the end of each fiscal year. Section 16(c)(6) specified that at the same time that the State agencies are informed of their error rates and possible incentive payments or claims, that the Secretary shall announce the national performance measure (the sum of the products of each State agency's error rate times that State agency's proportion of the total value of national allotments issued for a fiscal year).

Section 13951 of the Leland Act amends the Food Stamp Act by specifying that: "not later than 180 days after the end of the fiscal year, the case review and all arbitrations of State-Federal difference cases shall be completed. Not later than 30 days thereafter, the Secretary shall determine final error rates, the national average payment error rate, and the amounts of payment claimed against State agencies; and notify State agencies of the payment claims." In response to this change the Department is proposing a regulatory change at 7 CFR 275.23(e)(8) to reflect the new timeframes for the completion of the QC review process for a fiscal year.

#### **Interest Charges—§ 275.23(e)(9)**

Prior to the Leland Act, section 13(a)(1) of the Food Stamp Act specified that interest charges on any unpaid portion of a liability claim would accrue from the date of the decision on an administrative appeal of the claim, or from the day two years after the date the bill for the claim was received by the State agency, whichever was earlier. Section 13951 of the Leland Act amends the Food Stamp Act by changing the

timeframe for the accruing of interest charges from two years to one year. The Food Stamp Act now specifies that interest on any unpaid portion of the claim shall accrue from the date of the decision on the administrative appeal, or from the day that is one year after the date the bill is received, whichever is earlier, until the date the unpaid portion of the payment is received. In response to this change the Department is proposing a regulatory change at 7 CFR 275.23(e)(9) to reflect the new timeframe of one year.

In addition, the Department is taking the opportunity to make a technical correction to the language in this paragraph of the regulations. The current regulations specify that interest will accrue from the date that a State agency receives the bill for the liability claim unless the State agency appeals the claim "under § 276.7 of the regulations". Since regulations at 7 CFR 275.23(e)(9) regarding interest charges were published (November 27, 1991) (56 FR 60045) the administrative appeals process for liability claims has been modified to provide for appeal to a Departmental Administrative Law Judge. The procedures for appeal of claims to a Departmental Administrative Law Judge are contained in 7 CFR Part 283 of the regulations. The Department proposes to change the reference to the appeal process contained in 7 CFR 275.23(e)(9) from "under § 276.7 of the regulations" to "under Part 283 of the regulations".

#### **Miscellaneous Technical Corrections**

The Department is proposing to take advantage of the opportunity presented with the publication of this rule to effect technical corrections to regulatory references appearing in Part 275 of the regulations. In a number of paragraphs in Part 275 other paragraphs or sections of the regulations are cited as a reference for the reader. Over the years many of these references have become inaccurate due to revisions and renumbering of various sections of the regulations. The Department is taking this opportunity to correct references appearing in the following paragraphs: 275.3(c), 275.11(g), 275.23(d)(1)(iii), 275.23(e)(1), 275.23(e)(7)(i)(D), 275.23(e)(7)(ii), 275.23(e)(7)(iii)(A), 275.23(e)(7)(iii)(B), and 275.23(e)(10)(iii).

#### **Dates**

Section 13971 of the Leland Act sets implementation dates for the various provisions of the law addressed in this proposed rule. The provisions of section 13951 that amended sections 13(a)(1), 14(a), and 16(c) of the Act are effective

on October 1, 1991, with the exception of the provision regarding exclusion of variances resulting from the application of new regulations. The provision regarding the exclusion of variances resulting from the application of new regulations is effective on October 1, 1992.

#### **List of Subjects**

##### **7 CFR Part 273**

Administrative practice and procedure, Aliens, Claims, Food stamps, Fraud, Grant programs—social programs, Penalties, Records, Reporting, and recordkeeping requirements, Social Security, Students.

##### **7 CFR Part 275**

Administrative practice and procedure, Food stamps, Reporting, and recordkeeping requirements.

For the reasons set out in the preamble, Parts 273 and 275 of Chapter II of Title 7 *Code of Federal Regulations* are proposed to be amended as follows:

#### **PART 273—CERTIFICATION OF ELIGIBLE HOUSEHOLDS**

1. The authority citation for Part 273 continues to read as follows:

**Authority:** 7 U.S.C. 2011–2032.

##### **§ 273.2 [Amended]**

2. In § 273.2:

- a. the third sentence of paragraph (d)(2) is amended by removing the words "after 95 days" and adding the words "after 90 days" in their place;
- b. the first sentence of paragraph (f)(1)(ix) is amended by removing the words "after 95 days" and adding the words "after 90 days" in their place.

#### **PART 275—PERFORMANCE REPORTING SYSTEM**

3. The authority citation for Part 275 continues to read as follows:

**Authority:** 7 U.S.C. 2011–2032.

4. In § 275.3:

- a. the last sentence of the introductory text of paragraph (c) is amended by removing the reference to "275.23(e)(6)" and adding in its place a reference to "275.23(e)(8)";
  - b. paragraph (c)(1)(iii) is revised;
  - c. paragraph (c)(4) is revised.
- The revisions read as follows:

##### **§ 275.3 Federal monitoring.**

\* \* \* \* \*

(c) *Validation of State Agency Error Rates.* \* \* \*

(1) *Payment error rate.* \* \* \*

(iii) Upon the request of a State agency, the appropriate FCS Regional Office will assist the State agency in



completing active cases reported as not completed due to household refusal to cooperate.

\* \* \* \* \*

(4) *Arbitration.* (i) Whenever the State agency disagrees with the FCS regional office concerning individual QC case findings and the appropriateness of actions taken to dispose of an individual case, the State agency may request that the dispute be arbitrated on a case-by-case basis by an FCS Arbitrator, subject to the following limitations.

(A) The State agency may only request arbitration when the State agency's and FCS regional office's findings or disposition of an individual QC case disagree.

(B) The arbitration review shall be limited to the point(s) within the Federal findings or disposition that the State agency disputes. However, if the arbitrator in the course of the review discovers a mathematical error in the computational sheet, the arbitration shall correct the error while calculating the allotment.

(C) The State agency shall only be eligible to request arbitration of the Federal findings or disposition of an individual case if that case was disposed of and the findings reported in accordance with the timeframes specified in § 275.21(b)(2). An exception shall be made for cases which fail to meet the timeframes specified in § 275.21(b)(2) if the cases were originally disposed of by the State agency, in a timely manner, as incomplete due to refusal-to-cooperate on the part of the household. If the household later agrees to cooperate with the Quality Control reviewer, and the case is retransmitted into IQCS as completed, then the secondary disposition/findings shall not be subject to the timeliness of disposition restriction.

(ii) The FCS Arbitrator(s) shall be an individual or individuals who are not directly involved in the validation effort.

(iii) The State agency shall submit a request for arbitration, to be received by the appropriate FCS regional office within 10 calendar days of the date of receipt by the State agency of the regional office case findings. In the event the last day of this time period falls on a Saturday, Sunday, or Federal or State holiday, the period shall run to the end of the next work day.

(iv) When the State agency requests arbitration, it shall submit all required documentation to the appropriate FCS regional office addressed to the attention of the FCS Arbitrator. The FCS regional office QC staff may submit a

response to the State agency's request to the FCS Arbitrator.

(A) A complete request is one that contains all of the information that FCS requires. The following items shall be required:

(1) The request for arbitration and basic case information, which would include State, sample month and year, review number, review date, reporting and budgeting procedure, food stamp procedures for budgeting grants from the Aid to Families with Dependent Children Program, certification period, and calendar or fiscal month system.

(2) Information about the certification action under dispute, which would include initial certification or recertification, legible certification work papers, legible State agency quality control work papers, and legible regional office quality control work papers.

(3) Information about the State agency's specific issues, which would include the element under dispute, regulatory citations, handbook citations, policy memoranda, legislative implementation dates, applicable waivers, and verification of facts.

(B) If the State agency's request is not complete the arbitrator shall make a decision based solely on the available documents.

(v) The FCS Arbitrator shall have 35 calendar days from the date of receipt of a State agency's request for arbitration to review the case and make a decision.

\* \* \* \* \*

#### § 275.11 [Amended]

5. In § 275.11:

a. the third sentence of paragraph (g) is amended by removing the reference to "275.25(e)(6)" and adding in its place a reference to "275.23(e)(8)";

b. the fourth sentence of paragraph (g) is amended by removing the reference to "275.25(c)" and adding in its place a reference to "275.23(c)".

6. In § 275.12:

a. the introductory text of paragraph (d)(2)(vii) is revised;

b. paragraph (d)(2)(vii)(A) is revised;

c. paragraph (d)(2)(vii)(D) is revised.

The revisions read as follows:

#### § 275.12 Review of active cases.

\* \* \* \* \*

(d) *Variance identification.* \* \* \*

(2) *Variances excluded from error analysis.* \* \* \*

(vii) Subject to the limitations provided in paragraphs (d)(2)(vii)(A) through (d)(2)(vii)(F) of this section any variance resulting from application of a new Program regulation or implementing memorandum (if one is sent to advise State agencies of a change

in Federal law, in lieu of regulations) during the first 120 days from the required implementation date.

(A) When a regulation allows a State agency an option to implement prior to the required implementation date, the date on which the State agency chooses to implement may, at the option of the State, be considered to be the required implementation date for purposes of this provision. The exclusion period would be adjusted to begin with this date and end on the 120th day that follows. States choosing to implement prior to the required implementation date must notify the appropriate FCS Regional Office, in writing, prior to implementation that they wish the 120 day variance exclusion to commence with actual implementation. Absent such notification, the exclusionary period will commence with the required implementation date.

\* \* \* \* \*

(D) Regardless of when the State agency actually implemented the regulation, the variance exclusion period shall end on the 120th day following the required implementation date, including the required implementation date defined in paragraph (d)(2)(vii)(A) of this section.

\* \* \* \* \*

7. In § 275.21:

a. paragraph (b)(2) is revised;

b. the first sentence of paragraph (b)(4) is amended by removing the words "pending 95 days" and adding the words "pending 90 days" in their place.

The revision reads as follows:

#### § 275.21 Quality control review reports.

\* \* \* \* \*

(b) *Individual cases.* \* \* \*

(2) The State agency shall dispose of and report the findings of 90 percent of all cases selected in a given sample month so that they are received by FCS within 75 days of the end of the sample month. All cases selected in a sample month shall be disposed of and the findings reported so that they are received by FCS within 90 days of the end of the sample month. Without FCS approval, no active case shall be reported as not completed solely because the State agency was unable to process the case review in time for it to be reported in accordance with these timeframes.

\* \* \* \* \*

8. In § 275.23:

a. the last sentence of paragraph (d)(1)(iii) is amended by removing the reference to "(e)(6)(iii)" and adding in its place a reference to "(e)(8)(iii)";

b. paragraph (e)(1) is amended by removing the reference to "paragraph

(e)(6))" and adding in its place a reference to "paragraph (e)(8)";

c. the heading of paragraph (e)(4) is amended by removing the words "*Fiscal Year 1986 and Beyond*" and adding the words "*Fiscal Years 1986 through Fiscal Year 1991*" in their place;

d. the first sentence of paragraph (e)(4)(i) is amended by removing the words "For Fiscal Year 1986 and subsequent years" and adding the words "For Fiscal Year 1986 through Fiscal Year 1991" in their place;

e. paragraphs (e)(5), (e)(6), (e)(7), (e)(8), (e)(9), and (e)(10) are redesignated as paragraphs (e)(6), (e)(7), (e)(8), (e)(9), (e)(10), and (e)(11), respectively, and a new paragraph (e)(5) is added;

f. the newly redesignated paragraph (e)(7) is revised;

g. the first sentence of newly redesignated paragraph (e)(8)(i)(D) is amended by removing the reference to "paragraph (e)(7)(iii)" and adding in its place a reference to "paragraph (e)(8)(iii)";

h. the last sentence of newly redesignated paragraph (e)(8)(ii) is amended by removing the words "procedure of § 276.7" and adding the words "procedures of Part 283" in their place;

i. the first sentence of newly redesignated paragraph (e)(8)(iii)(A) is amended by removing the reference to "paragraph (e)(7)(i)(C)" and adding in its place a reference to "paragraph (e)(8)(i)(C)";

j. the first sentence of newly redesignated paragraph (e)(8)(iii)(B) is amended by removing the reference to "paragraph (e)(7)(i)(C)" and adding in its place a reference to "paragraph (e)(8)(i)(C)";

k. the first three sentences in newly redesignated paragraph (e)(9) are revised;

l. in newly redesignated paragraph (e)(10)(i) the first sentence is amended by removing the reference to "275.23(e)(4)" and adding in its place a reference to "275.23(e)(5)". The second sentence is amended by removing the reference to "276.7" and adding in its place a reference to "Part 283". The fourth sentence is amended by removing the words "2 years" and adding the words "one year" in their place.

m. the last sentence of newly redesignated paragraph (e)(11)(iii) is amended by removing the reference to "(e)(10)(vi)" and adding in its place a reference to "(e)(11)(vi)".

The revisions and additions read as follows:

#### § 275.23 Determination of State agency program performance.

\* \* \* \* \*

(e) *State agencies' liabilities for payment error rates.* \* \* \*

(5) *State agencies' liabilities for payment error—Fiscal Year 1992 and beyond.* Each State agency that fails to achieve its payment error rate goal during a fiscal year shall be liable as specified in the following paragraphs.

(i) For Fiscal Year 1992 and subsequent years, FCS shall announce a national performance measure within 30 days following the completion of the case review and the arbitration processes for the fiscal year. The national performance measure is the sum of the products of each State agency's payment error rates times that State agency's proportion of the total value of national allotments issued for the fiscal year using the most recent issuance data available at the time the State agency is notified of its payment error rate. Once announced, the national performance measure for a given fiscal year will not be subject to change.

(ii) For any fiscal year in which a State agency's payment error rate exceeds the national performance measure for the fiscal year, the State agency shall pay or have its share of administrative funding reduced by an amount equal to the product of:

(A) the value of all allotments issued by the State agency in the fiscal year; multiplied by

(B) the lesser of—

(1) the ratio of the amount by which the payment error rate of the State agency for the fiscal year exceeds the national performance measure for the fiscal year, to the national performance measure for the fiscal year, or

(2) one; multiplied by

(C) the amount by which the payment error rate of the State agency for the fiscal year exceeds the national performance measure for the fiscal year.

\* \* \* \* \*

(7) *Good cause—(i) Events.* When a State agency with otherwise effective administration exceeds the tolerance level for payment errors as described in this section, the State agency may seek relief from liability claims that would otherwise be levied under this section on the basis that the State agency had good cause for not achieving the payment error rate tolerance. State agencies desiring such relief must file an appeal with the Department's Administrative Law Judge (ALJ) in accordance with the procedures established under Part 283 of this chapter. The 5 unusual events described below are considered to have a potential for disrupting program operations and increasing error rates to an extent that relief from a resulting liability or

increased liability is appropriate. The occurrence of an event(s) does not automatically result in a determination of good cause for an error rate in excess of the national performance measure. The State agency must demonstrate that the event had an adverse and uncontrollable impact on program operations during the relevant period, and the event caused an uncontrollable increase in the error rate. Good cause relief will only be considered for that portion of the error rate/liability attributable to the unusual event. The following are unusual events which State agencies may use as a basis for requesting good cause relief and specific information that must be submitted to justify such requests for relief:

(A) Natural disasters such as those under the authority of the Stafford Act of 1988 (Pub. L. 100-707), which amended the Disaster Relief Act of 1974 (Pub. L. 93-288) or civil disorders that adversely affect program operations.

(I) When submitting a request for good cause relief based on this example, the State agency shall provide the following information:

(i) The nature of the disaster(s) (e.g. a tornado, hurricane, earthquake, flood, etc.) or civil disorder(s) and evidence that the President has declared a disaster;

(ii) The date(s) of the occurrence;

(iii) The date(s) after the occurrence when program operations were affected;

(iv) The geographic extent of the occurrence (i.e. the county or counties where the disaster occurred);

(v) The proportion of the food stamp caseload whose management was affected;

(vi) The reason(s) why the State agency was unable to control the effects of the disaster on program administration and errors;

(vii) The Identification and explanation of the uncontrollable nature of errors caused by the event (types of errors, geographic location of the errors, time period during which the errors occurred, etc.).

(viii) The percentage of the payment error rate that resulted from the occurrence and how this figure was derived; and

(ix) The degree to which the payment error rate exceeded the national performance measure in the subject fiscal year.

(2) The following criteria and methodology will be used to assess, evaluate and respond to claims by the State agency for a good cause waiver of liability in conjunction with the appeals process, and to determine that portion of the error rate/liability attributable to the uncontrollable effects of a disaster or

civil disorder: Geographical impact of the disaster; State efforts to control impact on program operations; the proportion of food stamp caseload affected; and/or the duration of the disaster and its impact on program operations. Adjustments for these factors may result in a waiver of all, part, or none of the error rate liabilities for the applicable period. As appropriate, the waiver amount will be adjusted to reflect States' otherwise effective administration of the program based upon the degree to which the error rate exceeds the national performance measure. For example, a reduction in the amount may be made when a State agency's recent error rate history indicates that even absent the events described, the State agency would have exceeded the national performance measure in the review period. If a State agency has provided insufficient information to determine a waiver amount for the uncontrollable effects of a natural disaster or civil disorder using factual analysis, the waiver amount shall be evaluated using the following formula and methodology which measures both the duration and intensity of the event: Duration will be measured by the number of months the event had an adverse impact on program operations. Intensity will be a proportional measurement of the issuances for the counties affected to the State's total issuance. This ratio will be determined using issuance figures for the first full month immediately preceding the disaster. This figure will not include issuances made to households participating under disaster certification authorized by FCS for a natural disaster and already excluded from the error rate calculations under § 275.12(g)(2)(vi). "Counties affected" will include counties where the disaster/civil disorder occurred, and any other county that the State agency can demonstrate had program operations adversely impacted due to the event (such as a county that diverted significant numbers of food stamp certification or administrative staff). The amount of the waiver of liability will be determined using the following linear equation:  $Ia/Ib \times [M/12 \text{ or } Mp/18] \times L$  where: Ia is the issuance for the first full month immediately preceding the unusual event for the county affected; Ib is the State's total issuance for the first full month immediately preceding the unusual event; M/12 is number of months in the subject fiscal year that the unusual event had an adverse impact on program operations; Mp/18 is the number of months in the last half (April through September) of the prior fiscal

year that the unusual event had an adverse impact on program operations; L is the total amount of the liability for the fiscal year. Mathematically this formula could result in a waiver of more than 100% of the liability, however, no more than 100% of a State's liability will be waived for any one fiscal year. Under this approach, unless the State agency can demonstrate a direct uncontrollable impact on the error rate, the effects of disasters or civil disorders that ended prior to the second half of the prior fiscal year will not be considered.

(B) Strikes by state agency staff necessary to determine Food Stamp Program eligibility and process case changes.

(1) When submitting a request for good cause relief based on this example, the State agency shall provide the following information:

- (i) Which workers (i.e. eligibility workers, clerks, data input staff, etc.) and how many (number and percentage of total staff) were on strike or refused to cross picket lines;
- (ii) The date(s) and nature of the strike (i.e. the issues surrounding the strike);
- (iii) The date(s) after the occurrence when program operations were affected;
- (iv) The geographic extent of the strike (i.e. the county or counties where the strike occurred);
- (v) The proportion of the food stamp caseload whose management was affected;
- (vi) The reason(s) why the State agency was unable to control the effects of the strike on program administration and errors;
- (vii) Identification and explanation of the uncontrollable nature of errors caused by the event (types of errors, geographic location of the errors, time period during which the errors occurred, etc.);
- (viii) The percentage of the payment error rate that resulted from the strike and how this figure was derived; and
- (ix) The degree to which the payment error rate exceeded the national performance measure in the subject fiscal year.

(2) The following criteria shall be used to assess, evaluate and respond to claims by the State agency for a good cause waiver of liability in conjunction with the appeals process, and to determine that portion of the error rate/liability attributable to the uncontrollable effects of the strike: Geographical impact of the strike; State efforts to control impact on program operations; the proportion of food stamp caseload affected; and/or the duration of the strike and its impact on program operations. Adjustments for these

factors may result in a waiver of all, part, or none of the error rate liabilities for the applicable period. For example, the amount of the waiver might be reduced for a strike that was limited to a small area of the State. As appropriate, the waiver amount will be adjusted to reflect States' otherwise effective administration of the program based upon the degree to which the error rate exceeded the national performance measure. If a State agency has provided insufficient information to determine a waiver amount for the uncontrollable effects of a strike using factual analysis, a waiver amount shall be evaluated by using the formula described in paragraph (e)(7)(i)(A) of this section. Under this approach, unless the State agency can demonstrate a direct uncontrollable impact on the error rate, the effects of strikes that ended prior to the second half of the prior fiscal year will not be considered.

(C) A significant growth in food stamp caseload in a State prior to or during a fiscal year, such as a 15 percent growth in caseload. Caseload growth which historically increases during certain periods of the year will not be considered unusual or beyond the State agency's control.

(1) When submitting a request for good cause relief based on this example, the State agency shall provide the following information:

- (i) The amount of growth (both actual and percentage);
- (ii) The time the growth occurred (what month(s)/year);
- (iii) The date(s) after the occurrence when program operations were affected;
- (iv) The geographic extent of the caseload growth (i.e. Statewide or in which particular counties);
- (v) The impact of caseload growth;
- (vi) The reason(s) why the State agency was unable to control the effects of caseload growth on program administration and errors;
- (vii) The percentage of the payment error rate that resulted from the caseload growth and how this figure was derived; and
- (viii) The degree to which the error rate exceeded the national performance measure in the subject fiscal year.

(2) The following criteria and methodology shall be used to assess, evaluate and respond to claims by the State agency for a good cause waiver of liability in conjunction with the appeals process, and to determine that portion of the error rate/liability attributable to the uncontrollable effects of unusual caseload growth: Geographical impact of the caseload growth; State efforts to control impact on program operations; the proportion of food stamp caseload

affected; and/or the duration of the caseload growth and its impact on program operations. Adjustments for these factors may result in a waiver of all, part, or none of the error rate liabilities for the applicable period. As appropriate, the waiver amount will be adjusted to reflect States' otherwise effective administration of the program based upon the degree to which the error rate exceeded the national performance measure. For example, a reduction in the amount may be made when a state agency's recent error rate history indicates that even absent the events described, the State agency would have exceeded the national performance measure in the review period. Under this approach, unless the State agency can demonstrate a direct uncontrollable impact on the error rate, the effects of caseload growth that ended prior to the second half of the prior fiscal year will not be considered. If the State agency has provided insufficient information to determine a waiver amount for the uncontrollable effects of caseload growth using factual analysis, the waiver amount shall be evaluated using the following five step calculation: first, determine the average number of households certified to participate statewide in the Food Stamp Program for the base period consisting of the twelve consecutive months ending with March of the prior fiscal year; second, determine the percentage of increase in caseload growth from the base period (step 1) using the average number of households certified to participate statewide in the Food Stamp Program for the twelve month period beginning with April of the prior fiscal year and ending with March of the current fiscal year; third, determine the percentage the error rate for the subject fiscal year as calculated under paragraph (e)(5)(i) of this section exceeds the national performance measure determined in accordance with paragraph (e)(5)(i) of this section; fourth, divide the percentage of caseload growth increase arrived at in step 2 by the percentage the error rate for the subject fiscal year exceeds the national performance measure as determined in step 3; and finally, multiply the quotient arrived at in step 4 by the liability amount for the current fiscal year to determine the amount of waiver of liability. Under this methodology, caseload growth of less than 15% and/or occurring in the last half of the subject fiscal year will not be considered. Mathematically this formula could result in a waiver of more than 100% of the liability, however, no more

than 100% of a State's liability will be waived for any one fiscal year.

(D) A change in the food stamp program or other Federal or State program that has a substantial adverse impact on the management of the food stamp program of a State. Requests for relief from errors caused by the uncontrollable effects of unusual program changes other than those variances already excluded by § 275.12(d)(2)(vii) will be considered to the extent the program change is not common to all States.

(1) When submitting a request for good cause relief based on unusual changes in the Food Stamp or other Federal or State programs, the State agency shall provide the following information:

- (i) The type of change(s) that occurred;
- (ii) When the change(s) occurred;
- (iii) The nature of the adverse effect of the changes on program operations and the State agency's efforts to mitigate these effects;
- (iv) Reason(s) the State agency was unable to adequately handle the change(s);
- (v) Identification and explanation of the uncontrollable errors caused by the changes (types of errors, geographic location of the errors, time period during which the errors occurred, etc.);
- (vi) The percentage of the payment error rate that resulted from the adverse impact of the change(s) and how this figure was derived; and
- (vii) The degree to which the payment error rate exceeded the national performance measure in the subject fiscal year.

(2) The following criteria will be used to assess, evaluate and respond to claims by the State agency for a good cause waiver of liability in conjunction with the appeals process, and to determine that portion of the error rate/liability attributable to the uncontrollable effects of unusual changes in the Food Stamp Program or other Federal and State programs: Geographical impact of the unusual changes in the Food Stamp Program or other Federal and State programs; State efforts to control impact on program operations; the proportion of food stamp caseload affected; and/or the duration of the unusual changes in the Food Stamp Program or other Federal and State programs and the impact on program operations. Adjustments for these factors may result in a waiver of all, part, or none of the error rate liabilities for the applicable period. As appropriate, the waiver amount will be adjusted to reflect States' otherwise effective administration of the program

based upon the degree to which the error rate exceeded the national performance measure.

(E) A significant circumstance beyond the control of the State agency. Requests for relief from errors caused by the uncontrollable effect of the significant circumstance other than those specifically set forth in this paragraph will be considered to the extent that the circumstance is not common to all States, such as a fire in a certification office.

(1) When submitting a request for good cause relief based on significant circumstances, the State agency shall provide the following information:

- (i) The significant circumstances that the State agency believes uncontrollably and adversely affected the payment error rate for the fiscal year in question;
- (ii) Why the State agency had no control over the significant circumstances;
- (iii) How the significant circumstances had an uncontrollable and adverse impact on the State agency's error rate;
- (iv) Where the significant circumstances existed (i.e. Statewide or in particular counties);
- (v) When the significant circumstances existed (provide specific dates whenever possible);
- (vi) The proportion of the food stamp caseload whose management was affected;
- (vii) Identification and explanation of the uncontrollable errors caused by the event (types of errors, geographic location of the errors, time period during which the errors occurred, etc.);
- (viii) The percentage of the payment error rate that was caused by the significant circumstances and how this figure was derived; and
- (ix) The degree to which the payment error rate exceeded the national performance measure in the subject fiscal year.

(2) The following criteria shall be used to assess, evaluate and respond to claims by the State agency for a good cause waiver of liability in conjunction with the appeals process, and to determine that portion of the error rate/liability attributable to the uncontrollable effects of a significant circumstance beyond the control of the State agency, other than those set forth in paragraph (e)(7)(i)(E) of this section: Geographical impact of the significant circumstances; State efforts to control impact on program operations; the proportion of food stamp caseload affected; and/or the duration of the significant circumstances and the impact on program operations. Adjustments for these factors may result

in a waiver of all, part, or none of the error rate liabilities for the applicable period. As appropriate, the waiver amount will be adjusted to reflect States' otherwise effective administration of the program based upon the degree to which the error rate exceeded the national performance measure.

(ii) *Adjustments.* When good cause is found under the criteria in paragraphs (e)(7)(i)(A) through (e)(7)(i)(E) of this section, the waiver amount may be adjusted to reflect States' otherwise effective administration of the program based upon the degree to which the error rate exceeds the national performance measure.

(iii) *Evidence.* When submitting a request to the ALJ for good cause relief, the State agency shall include such data and documentation as is necessary to support and verify the information submitted in accordance with the requirements of paragraph (e)(7) of this section so as to fully explain how a particular significant circumstance(s) uncontrollably affected its payment error rate.

(iv) *Finality.* The initial decision of the ALJ concerning good cause shall constitute the final determination for purposes of judicial review without further proceedings as established under the provisions of § 283.17 and § 283.20 of this chapter.

\* \* \* \* \*

(9) *FCS Timeframes.* FCS shall determine, and announce the national average payment error rate for a fiscal year within 30 days following the completion of the case review process and all arbitrations of State agency-FCS difference cases for that fiscal year, and at the same time FCS shall notify all State agencies of their individual payment error rates and payment error rate liabilities, if any. The case review process and the arbitration of all difference cases shall be completed not later than 180 days after the end of fiscal year. FCS shall initiate collection action on each claim for such liabilities before the end of the fiscal year following the end of the fiscal year reporting period in which the claim arose unless an administrative appeal relating to the claim is pending. \* \* \*

\* \* \* \* \*

Dated: June 16, 1995.

**Ellen Haas,**

*Under Secretary, Food, Nutrition, and Consumer Services.*

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## DEPARTMENT OF ENERGY

### Office of Energy Efficiency and Renewable Energy

#### 10 CFR Part 430

#### Energy Conservation Program for Consumer Products; Energy Efficiency Standards for Television Sets

**AGENCY:** Office of Energy Efficiency and Renewable Energy, Department of Energy.

**ACTION:** Proposed rule; withdrawal.

**SUMMARY:** The Department of Energy (Department) today withdraws a proposed rule to establish energy efficiency standards for television sets. Promulgation of such a rule is discretionary under the terms of the authorizing legislation for the program. This action is based on: a decision to focus the Department's limited resources on standards-related rulemakings that are mandatory under the authorizing legislation; and acceptance of arguments reflected in the comments that the uncertainty created by the rulemaking and any resulting standards could adversely affect the development of innovative television technologies critical to the Nation's future economy and international competitive position.

#### FOR FURTHER INFORMATION CONTACT:

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#### SUPPLEMENTARY INFORMATION:

##### 1. Authority

Part B of Title III of the Energy Policy and Conservation Act (EPCA), Pub. L. 94-163, created the Energy Conservation Program for Consumer Products other than automobiles. In 1978, the National Energy Conservation Policy Act (NECPA), Pub. L. 95-619, amended EPCA and required DOE to establish mandatory energy efficiency standards for each of the 13 listed "covered products," including television sets. In 1987, the National Appliance Energy Conservation Act (NAECA), Pub. L. 100-12, amended EPCA, by refining the list of appliances

defined as "covered products" and establishing federal energy conservation standards for 11 of the 12 "covered products" on the revised list. Television sets have a unique status under EPCA—televisions are listed as "covered products," but are the only covered product for which the statute does not require a standard. Moreover, televisions have a unique status under EPCA with regard to rulemakings. EPCA requires the Department to undertake rulemakings with regard to the other covered products according to a prescribed schedule. By contrast, with regard to televisions, EPCA provides the Secretary with discretion to establish an energy conservation standard for television sets by rule, but does not require such a rulemaking. 42 U.S.C. 6295(l)(3).

##### 2. Background

On March 4, 1994, the Department published a notice of proposed rulemaking regarding energy conservation standards for eight products. (59 FR 10464.) The rulemaking is mandatory for seven of these products. The eighth product was television sets. The Department invited interested members of the public to submit written comments and to participate at a public hearing. The public comment period closed on July 18, 1994. During the comment period, over 35 comments were received on the proposed rule regarding energy conservation standards on television sets from manufacturers, consumers, members of Congress, retailers, national energy advocates and environmental groups. The Department has reviewed and evaluated the comments. On January 31, 1995, the Department published a **Federal Register** notice describing the Department's plans for pursuing these rulemakings. (60 FR 5880.) That notice acknowledged the need for further data collection prior to deciding how to proceed with the proposed standards for televisions. Such data collection would involve original development of test data that is otherwise unavailable.

Since the January notice, there have been a variety of developments. First, the appropriations requested for this program and preliminary Congressional actions on this request suggest that resources to carry out this program are likely to be limited and are unlikely to be sufficient to support all of the possible analyses related to TVs and other products covered by the authorizing legislation. Second, the Department has been urged to give priority to rulemakings affecting other products by manufacturers of those